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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SEAN ANTHONY CHRISTENSON, Defendant and Appellant.	A093460 (Contra Costa County Super. Ct. No. 0004259)

The defendant appeals his convictions for assault with a deadly weapon or force likely to produce great bodily injury and driving under the influence of alcohol causing injury to two separate victims, in violation of Vehicle Code sections 23153(a) and (b). Defendant contends the assault charge is not supported by sufficient evidence and claims instructional error. He contends that he should not have been convicted of separate violations of section 23153 for one act of driving with injury to multiple victims. We agree with the latter argument and reverse defendant's convictions on counts five and six. We otherwise affirm the judgment.

Factual and Procedural Background

On January 21, 2000, approximately 10:00 p.m., Contra Costa County Sheriff's Deputies David Bullard and Leonard Curry responded to a report of a loud party. Defendant and his friend Michelle Hawkins had been at the party for an hour or two. Both were intoxicated. At some point, defendant and Hawkins left the party and walked

to defendant's car. They sat in the car for 15 to 20 minutes as Hawkins talked to defendant, trying to sober him up.

Defendant then started the car and immediately backed into a shed. The crashing sound attracted Bullard and Curry. They approached the car and spoke with defendant. After ordering defendant to turn off the car and remain inside, Bullard contacted the California Highway Patrol to request a field sobriety test. Shortly thereafter, defendant again started the car, but turned it off at Bullard's request. Defendant then tried to leave the car, but Bullard ordered him to remain seated.

About a minute later, defendant turned on the car a third time. He looked at Hawkins and told her to "hang on." Bullard was standing in front of the car, almost directly in front of the driver's side headlight. He was about six feet from the front of the car. Bullard walked toward the car, put his hand on the hood and ordered defendant to turn off the car. Defendant drove forward. Bullard quickly moved backward about five or six steps, keeping pace with the moving car. Bullard hit the hood with both hands and yelled at defendant to stop. Defendant's window was down and he looked at Bullard. Bullard, fearing that he might fall under the moving car, jumped out of the way. Bullard estimated that defendant was driving about five to ten miles per hour.

Defendant turned onto Taylor Road and accelerated to about 20 miles per hour. Arnold Schmidt, who had also been at the party, was walking along the shoulder on the opposite side of the road. Defendant sped around a corner, lost control and struck Schmidt. The car then spun and hit a fence.

Schmidt, who was airlifted to the hospital, was hospitalized for over a week and had a metal plate implanted in his pelvis. He was unable to walk for more than a month because of his injuries. Hawkins was treated at a hospital for neck and back pain.

Officers arrested defendant and placed him in a patrol car. He struggled with the officers, kicking one of them in the chest. Defendant also kicked out the window of the patrol car. His blood alcohol level two hours after his arrest was .23 percent.

The jury convicted defendant of assault with a deadly weapon or by force likely to produce great bodily injury; resisting arrest; separate counts of driving under the

influence causing injury to Arnold Schmidt and Michelle Hawkins; separate counts of driving with a .08% blood alcohol level causing injury to Arnold Schmidt and Michelle Hawkins; and misdemeanor vandalism. The jury found true great bodily injury enhancements regarding Arnold Schmidt. The court sentenced defendant to four years, four months in prison.

Discussion

Sufficiency of the Evidence Supporting the Assault Conviction

Defendant argues that there was insufficient evidence to support his assault conviction. He contends the prosecution failed to produce substantial evidence that defendant intended to commit a battery on Deputy Bullard or that the foreseeable consequence of defendant' driving was the infliction of great bodily injury. His claims are without merit.

In determining whether substantial evidence supports the verdict, we consider the evidence in the light most favorable to the judgment and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

A. ***There is Sufficient Evidence of the Requisite Intent for Assault***

After defendant filed his opening brief in this matter, the California Supreme Court issued its opinion in *People v. Williams* (2001) 26 Cal.4th 779, clarifying the mental state required for assault: "[A]ssault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Id.* at p. 790.) "In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted

based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*Id*. at p. 788, fn. omitted.)

Under this definition, there was sufficient evidence supporting the requisite intent for assault. Defendant contends that his intent was merely to leave the parking lot and that it was Bullard who stepped in front of the car. However, we view the evidence in the light most favorable to the verdict. When defendant started the car the third time, Bullard was already standing directly in front of the car, about six feet away. Bullard walked toward defendant's car, put his hand on the hood and told defendant to turn off the car. Instead, defendant told Hawkins to "hang on" and drove the car forward, directly at Bullard, at a speed of 5 to 10 miles per hour. Bullard put both hands on the hood and stepped backward six or seven steps, keeping pace with the car in order to avoid being hit. He pounded the hood with his hands and repeatedly ordered defendant to stop. Bullard was able to jump out of the way without being injured. There is sufficient evidence to establish that defendant intended to drive his car forward with knowledge that Deputy Bullard was in front of the car.

Contrary to defendant's assertion, the prosecution was not required to prove that defendant intended to injure Deputy Ballard. "[A] defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Williams*, *supra*, 26 Cal.4th at p. 788, fn. 3.) Assault does not require a specific intent to injure the victim. (*Id.* at p. 788.) Under these circumstances, the jury could conclude that a reasonable person would know that driving the car at the deputy would probably and directly result in a battery. Once the defendant was aware of Deputy Bullard's presence in front of his car, his intent to move the car forward was sufficient evidence to support a finding of assault. (*Id.* at p. 790.)

Defendant argues that his conduct at most was reckless driving, which is insufficient to support an assault conviction. In *Williams*, *supra*, 26 Cal.4th 779, the Supreme Court reaffirmed that "mere recklessness or criminal negligence is still not enough" to constitute an assault. (*Id.* at p. 788.) The court, relying on *People v.*

Colantuano (1994) 7 Cal.4th 206, 219, clarified that "*Colantuano* meant 'recklessness' in its historical sense as a synonym for criminal negligence, rather than its more modern conception as a subjective appreciation of the risk of harm to another. [Citation.]" (*Williams*, *supra*, 26 Cal.4th at p. 788, fn. 4.)

Defendant cites *People v. Cotton* (1980) 113 Cal.App.3d 294 and *People v. Jones* (1981) 123 Cal.App.3d 83, in which the appellate courts reversed convictions for assault with a deadly weapon. In *Cotton*, the defendant led police on a high-speed chase up to 100 miles per hour. When a police officer drove into an intersection, the defendant attempted to avoid the officer by swerving and hitting the brakes. The defendant's vehicle skidded for a long distance before colliding with the officer's car. (*Supra*, 113 Cal.App.3d at pp. 296-298.) On appeal, the People conceded that the defendant did not deliberately hit the officer, but argued that his inherently dangerous conduct was sufficient to support the assault. (*Id.* at p. 302.) The court of appeal disagreed. It distinguished *People v. Finney* (1980) 110 Cal.App.3d 705, in which the defendant rammed his car into police vehicles during a high speed chase, and *People v. Claborn* (1964) 224 Cal.App.2d 38, in which the driver aimed his vehicle directly at the police officer's car, resulting in a head-on collision. The *Cotton* court concluded, "[r]eprehensible as may be the conduct of the defendant in this case, it constitutes no more than an example par excellence of the misdemeanor offense of reckless driving with injury . . . ." (*Supra*, 113 Cal.App.3d at p. 303.)

In *People v. Jones*, *supra*, 123 Cal.App. 3d 83, the defendant led police on a high-speed chase during which he rear-ended the victim's car. The court concluded that defendant's driving was only reckless, stating: "There is no evidence to show or infer defendant drove his vehicle at the other car involved in the collision." (*Id.* at p. 96.)

We disagree with defendant that the facts of this case are similar to those of *Cotton* and *Jones*. Unlike *Cotton*, defendant did not slow down, stop or swerve to avoid the deputy, nor did the deputy appear unexpectedly in his path leaving him no time to react. Unlike *Jones*, evidence shows that defendant *did* drive his car at Bullard. Under

these circumstances, defendant's actions were sufficient evidence to establish the general intent element of assault.

B. *There is Sufficient Evidence that Defendant Applied Force Likely to Produce Great Bodily Injury*

Defendant also contends the evidence fails to show that a foreseeable consequence of his act was infliction of bodily injury. While defendant acknowledges that an automobile can be a deadly weapon for purposes of Penal Code section 245, he argues that great bodily injury was never the likely consequence of his driving. He claims there was no evidence suggesting that Bullard had difficulty getting out of the way of the car or that the speed of the car would seriously injure Bullard. Defendant notes that no part of the car touched Bullard, who was uninjured.

Penal Code section 245, subdivision (a)(1) punishes assaults committed "with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." "One may commit an assault without making actual physical contact with the person of the victim; because the statute focuses on *use* of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1027.)

The California Supreme Court has defined "deadly weapon" as " 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' " (*Aguilar*, *supra*, 16 Cal.4th at pp. 1028-1029, quoting *In re Jose R.* (1982) 137 Cal.App.3d 269, 275-276.) Some objects, while not deadly per se, may be used in a manner likely to produce death or great bodily injury. "In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*Aguilar*, *supra*, 16 Cal.4th at p. 1029.) "[T]he jury's decisionmaking process in an aggravated assault case under section 245, subdivision (a)(1), is functionally identical regardless of whether, in the particular case, the defendant

employed a weapon alleged to be deadly as used or employed force likely to produce great bodily injury; in either instance, the decision turns on the nature of the force used. . . . '[A]ll aggravated assaults are ultimately determined based on the force likely to be applied against a person.' [Citation.]" (*Id.* at p. 1035.)

The speed of a car moving at 5 to 10 miles per hour might be relatively insignificant in a collision with another car. Here, however, Bullard was standing immediately in front of a car moving toward him at that speed. He was forced to backpedal six or seven steps and then jump out of the car's path. Bullard testified that he was concerned that he might "fall under the tire or trip or something." That Bullard was able to jump out of the car's path and escape injury does not undermine the jury's factual finding that great bodily injury was likely under the circumstances. On this record, there was sufficient evidence that defendant intentionally used his car in such a manner as to be capable of producing and likely to produce death or great bodily injury.

Instructional Error

Defendant contends that the trial court erroneously instructed the jury on the definition of a deadly weapon by refusing to give CALJIC No. 12.42. He also urges the court erred in instructing on the intent element of assault. Specifically, he argues CALJIC No. 9.00 is erroneous and affected the outcome of this case. Additionally, he alleges the court erred in failing to give defendant's requested pinpoint instructions regarding negligence and recklessness.

A. *The Court Did Not Err in Refusing to Instruct with CALJIC No. 12.42*

Instructions given by the trial court included CALJIC No. 9.20, defining assault with a deadly weapon on a police officer; CALJIC No. 9.00, defining simple assault; CALJIC No. 3.30, defining general criminal intent; and CALJIC No. 17.20, defining great bodily injury. The court rejected defendant's request to instruct with CALJIC No.12.42, which defines deadly weapon for purposes of Penal Code section 12020 et seq., concerning possession of deadly weapons.

During deliberations, the jury requested: "Is it possible to provide a legal definition of the term 'deadly weapon' as used in this case?" At that point, defense

counsel renewed his request that the jury be instructed with CALJIC No. 12.42 as follows. "A deadly weapon is any weapon, instrument or object that is capable of being used to inflict death or great bodily injury, and it can be inferred from the evidence, including the attendant circumstances, the time, place, destination of the possessor, the alteration, if any, of the object from its standard form, and any other relevant facts, that the possessor intended on that or those occasions to use it as a weapon should the circumstances require."

Instead, the court responded by giving the standard instruction contained in CALJIC 9.02: "A deadly weapon is any object, instrument, or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury." The court previously defined bodily injury as "significant or substantial physical injury. Minor, trivial or moderate injuries do not constitute great bodily injury."

We previously noted the definition of deadly weapon stated in *People v. Aguilar*, *supra*, 16 Cal.4th at pages 1028-1029: " 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' " This same definition is contained in CALJIC No. 9.02. The *Aguilar* court further observed that "[t]he standard instructions on aggravated assault [contained in CALJIC No. 9.02] reflect [the] fundamental identity of the concepts of assault with a deadly weapon and assault by means of force likely to produce great bodily injury." (*Id.* at p. 1036.) CALJIC 9.02 adequately instructed on the principles of law relevant to the case. The court was not required to provide the jury with an instruction relating to offenses under Penal Code section 12020.

Defendant argues that the definition of deadly weapon in CALJIC No. 9.02 is incomplete. He contends that where, as here, the object is not an inherently deadly weapon, the jury must be instructed to consider the attendant circumstances for evidence that the possessor "intended on that or those occasions to use it as a weapon should the circumstances require." (CALJIC No. 12.42.) Prosecutions for violations of Penal Code section 12020 involve different issues. The section criminalizes mere possession of a dangerous weapon. There can be a significant question whether an object like a baseball

bat or lock hanging from a chain constitute such a weapon. The jury is called upon to distinguish whether the possession of a given object under given circumstances is innocent or criminal. In such cases, the intent with which a defendant possesses the item can be critical. Thus, the jury needs the additional guidance of CALJIC No. 12.42.

Here, defendant is not accused of *possessing* a car that could be used as a weapon. He was accused of *using* a car as a weapon. The jury was not prevented from considering all the attendant circumstances. In fact, it was required to do so. Defendant was not entitled, however, to have the jury consider those circumstances to determine if he harbored some intent beyond that required for this general intent crime.

B. *The Error in CALJIC 9.00 Was Harmless and the Court Did Not Err in Refusing to Give Defendant's Pinpoint Instructions*

The trial court instructed the jury on the intent element of assault with CALJIC No. 9.00 as follows: "In order to prove an assault, each of the following elements must be proved: [¶] One, a person willfully and unlawfully committed an act which by its nature would probably and directly result in the application of physical force on another person; [¶] Two, at the time that the act was committed, the person intended to use physical force upon another person or to do an act that was substantially certain to result in the application of physical force upon another; [¶] And three, at the time . . . the act was committed, the person had the present ability to apply physical force to the person of another. [¶] Willfully means . . . that the person committing the act did so intentionally. [¶] To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted, it may be considered in connection with other evidence in determining whether an assault was committed and if so the nature of that assault."

In *People v. Williams*, *supra*, 26 Cal.4th 779, the Supreme Court considered the instructional accuracy of the 1994 revision of CALJIC No. 9.00, which did not include the second paragraph of the version given to defendant's jury.[1] In *Williams*, the court determined the crime of assault requires proof that a defendant has "actual knowledge of

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[1] The second paragraph was added to the 1998 revision.

those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Id*. at p. 790.) The court found the instruction contained in the earlier version of CALJIC No. 9.00 "potentially ambiguous" because "a jury could conceivably convict a defendant for assault even if he did not actually know the facts sufficient to establish that his act by its nature would probably and directly result in a battery." (*Ibid.*)

The version of CALJIC No. 9.00 given to defendant's jury suffers from the same defect. Even with the addition of the second paragraph, the instruction did not tell the jury that the prosecution was required to prove defendant had actual knowledge of the facts that would lead a reasonable person to believe a battery was the probable and direct result of his conduct. The instruction allowed the jury to convict defendant of assault in the absence of proof that defendant acted with the requisite knowledge.

Defendant argues that it cannot be determined beyond a reasonable doubt that the court's failure to instruct on the knowledge requirement was harmless. He contends the jury could have reasonably concluded he was intoxicated at the time of the incident and may not have been aware of Bullard's presence as defendant attempted to leave. The uncontradicted evidence does not support this conclusion. Bullard testified that he was standing in front of the car near the driver's side headlight. As defendant drove forward, Bullard hit the hood with both hands and yelled for defendant to stop. Defendant's car window was open and he looked at Bullard. As to defendant's intoxication, the *Williams* court reiterated the principle stated in *People v. Hood* (1969) 1 Cal.3d 444, 459, that juries should not " 'consider evidence of defendant's intoxication in determining whether he committed assault.' " (*Williams*, *supra*, 26 Cal.4th at p. 788.)

Additionally, the prosecutor in closing argument, discussing the mental state requirement for assault, emphasized defendant's actual knowledge that Bullard was in front of the car. She argued: "Deputy Bullard was there. He told the defendant, "Sean, stop." [¶] Defendant saw him, and in fact Deputy Bullard testified 'I saw him. Saw him looking right at me.' He knew he was there. Knew Deputy Bullard was in his way, and [defendant] knew that he was going to get out of the exit. [¶] The only way he was

going to get out was to go through the obstacle that was there. That was Deputy Bullard. Deputy Bullard was the obstacle in him getting out of there and evading the arrest and not getting busted for a DUI." On this record, the court's failure to instruct the jury on the knowledge required for a conviction of assault was harmless.

Defendant also requested pinpoint instructions based on *People v. Smith* (1997) 57 Cal.App.4th 1470. Although the court in *Williams*, *supra*, 26 Cal.4th 779, did not explicitly overrule *Smith*, it failed to adopt *Smith*'s broad holding that CALJIC No. 9.00 erroneously defined assault with respect to the "natural and probable consequence" of the defendant's act. (*Smith*, *supra*, 57 Cal.App.4th at p. 1488.) Rather, the *Williams* court held that "actual knowledge" was required as well. The *Williams* court also implicitly rejected the *Smith* court's analysis that the defendant must intend to cause the injury or know that such consequence is "bound to happen." (*Smith*, *supra*, 57 Cal.App.4th at p. 1487.) Defendant's pinpoint instructions, which summarized the portion of *Smith*'s holding implicitly disapproved by the Supreme Court, were properly rejected.

Sentencing Error

Defendant was convicted in counts 3 and 4 of violations of Vehicle Code section 23153, subdivisions (a) and (b) based on alcohol-related driving offenses causing bodily injury to Arnold Schmidt, and in counts 5 and 6 violations of the same statutory provisions related to Michelle Hawkins. The court imposed 16 months on count 3, a concurrent term on count 5, and stayed imposition of sentence on counts 4 and 6 pursuant to Penal Code section 654.

The Attorney General concedes that under *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, defendant cannot be convicted of separate violations of section 23153 for one act of driving resulting in injury to multiple victims. The Attorney General agrees that defendant's convictions for counts 5 and 6, involving injury to Michelle Hawkins, must be set aside.

However, the Attorney General requests that we impose the one-year enhancement under Vehicle Code section 23558[2] for the bodily injury to Michelle Hawkins. He acknowledges that the information never alleged the section 23558 enhancement and was never amended to include it. He points out, however, that the information charged defendant with a violation of section 23153, subdivisions (a) and (b), which necessarily included driving that "proximately caused bodily injury to Michelle Hawkins." He contends that the allegations in the information, combined with the jury's finding of guilt, satisfied the requirement of Vehicle Code section 23558 that the "fact of the bodily injury to each additional victim is charged in the accusatory pleading and admitted or found to be true by the trier of fact."[3]

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2 Vehicle Code section 23558 provides in part: "Any person who proximately causes bodily injury or death to more than one victim in any one instance of driving in violation of Section 23153 of this code . . . shall, upon a felony conviction, and not withstanding subdivision (g) of Section 1170.1 of the Penal Code, receive an enhancement of one year in the state prison for each additional injured victim. The enhanced sentence provided for in this section shall not be imposed unless the fact of the bodily injury to each additional victim is charged in the accusatory pleading and admitted or found to be true by the trier of fact. The maximum number of one year enhancements which may be imposed pursuant to this section is three. [¶] Notwithstanding any other provision of law, the court may strike the enhancements provided in this section if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment."

3 After briefing in this matter was completed, the California Supreme Court decided *People v. Mancebo* (2002) 27 Cal.4th 735, which addressed pleading and proof problems with Penal Code section 667.61, the One Strike law. The court considered two pleading and notice provisions in the statute. Section 667.61, subdivision (i) requires that the existence of any fact necessary for one strike sentencing be "alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." Section 667.61 subdivision (f), states that if only the minimum number of qualifying circumstances necessary for sentencing under the One Strike law have been "pled and proved," those circumstances must be used to impose sentence pursuant to that law and to impose punishment under any other law. However, if more than the minimum number of qualifying circumstances have been "pled and proved," they "shall" be used to impose any additional terms authorized by law. The trial court in *Mancebo* concluded that while the multiple victim qualifying circumstance of section 667.61, subdivision (e)(5) was not pled, it was necessarily proved since the defendant was found guilty of committing qualifying crimes against two victims. The Supreme Court rejected this reasoning, concluding it was necessary to read sections 667.61, subdivisions (i) and (f) together. Read together, the provisions demonstrate that the qualifying circumstances must be specifically pled and found. The court described this requirement as "straightforward and plain." (*Supra*, 27 Cal.4th at pp. 749, 751.) The Supreme Court cautioned against extending its analysis of section 667.61 to other similar statutory provisions: "The parties note that various statutes utilize "pled and proved" or "alleged and found true" language similar to that found in section 667.61, subdivision (i). . . . We caution that our holding is limited to a construction of the language of section 667.61, subdivisions (f) and (i), read together, as controlling here. We have no occasion in this case to interpret other statutory provisions not directly before us." (*Id.* at p. 745, fn. 5.)

We decline the Attorney General's invitation as the reviewing court to impose an enhancement that was never alleged below and never discussed at sentencing in the trial court. The enhancement is mentioned for the first time on appeal. An enhancement is an additional term of imprisonment added to the base term. (Cal. Rules of Court, rule 4.405(c).) Penal Code section 1170.11 lists "specific enhancements," i.e., enhancements related to the circumstances of the crime. Section 23588 is identified in the statute as a specific enhancement. Section 1170.1, subdivision (e) provides: "All enhancements *shall be alleged in the accusatory pleading* and either admitted by the defendant in open court or found to be true by the trier of fact." (Italics added.) To avoid due process violations, the facts giving rise to a sentence enhancement must be alleged in the accusatory pleading so that a defendant can prepare his defense. (*People v. Hernandez* (1988) 46 Cal.3d 194, 197.)

As the Attorney General points out, defendant was charged with and convicted of violations of Vehicle Code section 23153 involving two separate victims. We acknowledge that it would be difficult for him to contest the truth of the section 23588 enhancement, whether or not the enhancement had been properly pled so as to afford him notice. Nevertheless, section 1170.1, subdivision (e) makes no special exception for section 23588 in the statute's pleading and proof requirements. These requirements apply to *all* the qualifying circumstances enumerated in section 1170.11. In many instances, the fair notice afforded by the pleading requirement may be imperative in a defendant's effort to contest the factual bases and truth of the enhancement.[4] As the

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[4] Additionally, section 1170.1, subdivision (e) provides that the enhancement may be admitted in open court. If there is no requirement that the section 23558 enhancement be specifically pled in the information because it can be established from the mere fact of Vehicle Code section 23153 violations against two victims, then the court faces a dilemma similar to the one described in *People v. Mancebo*, *supra*, 27 Cal.4th at page 752: "If we were to agree with the People that there is no requirement for the multiple victim qualifying circumstance to be specifically pled in the information because it can be established from the mere fact of ultimate conviction of qualifying sex offenses against multiple victims, how would a defendant 'admit[]' such a circumstance in open court if he chooses to waive a jury? Without an allegation of some specificity in the charging document affording the defendant notice of which qualifying circumstance or circumstances are being invoked for One Strike sentencing, there would be nothing for the defendant to 'admit' in open court pursuant to the alternative procedure prescribed in section 667.61, subdivision (i)."

reviewing court, we will not impose the Vehicle Code section 23588 enhancement, never alleged or discussed below.

Disposition

The judgment is reversed as to the convictions returned on counts five and six. The matter is remanded to the trial court for resentencing, with instructions to prepare an amended abstract of judgment in accordance with this opinion and forward a copy of the modified abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

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Corrigan, Acting P.J.

We concur:

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Parrilli, J.

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Pollak, J.